IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.78 OF 2005

Dattaram Keshav Aroskar & Ors. ...Appellants

Vs.

Namdeo Kuso Aroskar ...Respondent

Mr.N.V.Walawalkar with Mr.G.H.Keluskar for the Appellants
Mr.A.S.Khandeparkar for the Respondent.

CORAM: A.S.OKA, J.

DATED: MARCH 28,2005.

ORAL JUDGMENT:

1. On 24th March 2005, the Appeal was finally heard and today it is kept for dictation of the Judgment.

2. On the request made by the learned Counsel for the Appellant, the name of Appellant No.2 is permitted to be deleted at the risk of the Appellant Nos.1 and 3. It is stated that the Appellant No.2 has expired and the Appellant No.1 is his legal representative.

3. The challenge in this Appeal from Order is to the Judgment and Order dated 19th December 2001 by which Civil Misc.Application No.13 of 1996 was dismissed by the learned Additional District Judge, Sindhudurg at Oros.

4. The Appellants herein preferred Regular Civil Appeal No.8

of 1995 in the Court of District Judge at Sindhudurg for challenging the Judgment and Decree dated 14th December 1994 passed by the Trial Court. The Appeal was dismissed for default on 7th December 1995. On 13th March 1996, an application was filed by the Appellants for restoration of the Appeal. As there was delay in filing the said application, an application praying for condonation of delay was filed. The said application was opposed by the Respondent. By the impugned Judgment and Order dated 19th December 2001 the said application came to be rejected.

5. The learned Counsel for the Appellants submitted that the main application made by the Appellants was under Order XLI Rule 19 of the Code of Civil Procedure, 1908 praying for re-admission of the Appeal which was dismissed for default. He submitted that the result of the impugned order is that the main application stands dismissed and thus the impugned order has been passed in the main application itself. He relied upon the several decisions in support of his said contention a reference to which will be made at a later stage.

6. The learned Counsel for the Respondent submitted that the Appeal was dismissed as the Appellants failed to effect service on the Respondent. The Appeal is not dismissed under Rule 17 Order XLI. He submitted that the Appellate Court has invoked provisions of Order V for dismissing the Appeal.

7. I have considered the rival submissions. The application for condonation of delay was filed under Order XLI Rule 19 of the said Code for restoration of the Appeal. If the application under Order XLI Rule 19 is dismissed by an order as barred by limitation, it will have to be treated as an order in application under Order XLI Rule 19. A reference will have to be made to the Judgment of the Apex Court reported in A.I.R.1956 S.C. page 367 (Mela Ram and Sons V. Commissioner of Income Tax) which read thus :

> "On the principles laid down in these decisions, it must be held that an appeal presented out of time is an appeal, and an order dismissing it as time-barred is one passed in appeal"

8. In another Judgment of the Apex Court reported in A.I.R. 1982 S.C. page 1397 (Rani Choudhury Vs. Suraj Jit Choudhury) the Apex Court held thus :

> "There can be no dispute then that in law what the respondent did was to file an appeal and that the order dismissing it as time barred was one disposing of the appeal."

9. A learned Single Judge of this Court in a Judgment

reported in 2003 (1) Mh.L.J. page No.1011 (Chandrakant Govind Sutar Vs. M.K.Associates and Anr.) considered the question whether an order passed on the application for condonation of delay in filing the Appeal is one passed in the Appeal. The learned Single Judge after considering the observations of the Apex Court in various decisions held that the order on application for condonation of delay in filing the Appeal is one passed in Appeal itself. In a recent decision of the Apex Court reported in A.I.R. 2005 S.C. page No.226 (Shyam Sunder Sarma Vs. Pannalal Jaiswal and others), the Apex Court held that the order dismissing the application for condonation of delay is a decision in Appeal as there is always consequential dismissal of the Appeal on refusal to condone the delay.

10. In the present case the effect of the impugned order is that the application under Order XLI Rule 19 of the Code of Civil Procedure, 1908 stands dismissed. Therefore, the order impugned is an order, in substance, refusing to readmit the Appeal. The said order is appealable under Order XLIII Rule 1(t) of the said Code.

11. The order of the dismissal of the Appeal dated 7th December 1995 records that the Appellant and his Advocate were absent. It is recorded that the Appellants have not taken steps for effecting service on the Respondent. Perusal of the order shows that the Appeal is dismissed as the

Appellants and their Advocate were absent. The order also records that the Appellants failed to effect service on the Respondent. The said order in substance will have to be treated as an order passed under Rule 17 of Order XLI of the said Code. Hence the application made by the Appellants for restoration of the Appeal was maintainable under Order XLI Rule 19 of the said Code.

12. The Appeal was dismissed on 7th December 1995. An application was made for restoration of the Appeal on 13th March 1996. The case made out in the application is that the Appellants could not give necessary instruction to their Advocate and unfortunately when the Appeal was called out their Advocate was absent. In the application for condonation of the delay, it is stated that the Appellants had no knowledge about the date fixed in the Appeal.

13. It is true that the averments made in the application for condonation of delay are not satisfactory. It must be noted here that the delay was of about 2 months and six days. The delay was in making the application for restoration of the Appeal which was dismissed for default. In such cases, liberal approach on the part of the Appellate Court was contemplated especially when the delay is not inordinate. The question of condonation of delay arises only when there is some default on the part of the litigant. In the facts of the present case prejudice which might have been caused to

the Respondent could have been compensated in terms of money. In my view the delay deserves to be condoned. However, the Appellants will have to pay Rs.2,500/- by way of costs to the Respondent.

14. Hence, I pass the following order :

i) Impugned Judgment and Order is quashed and set aside.

ii) Civil Misc.Application No.23 of 1996 is allowed. The main application for restoration of the Appeal shall be registered and shall be decided in accordance with the law as expeditiously as possible.

iii) The Appellants will have to pay costs of Rs.2500/- to the Respondent within a period of four weeks from today. The payment of costs will be a condition precedent.

iv) Appeal is allowed in above terms.

v) Parties to act upon an authenticated copy of this order.

Judge.